UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

MAINE CARE SERVICES, INC.,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Civil No. 00-358-P-H***
	)	
UNITED STATES DEPARTMENT OF AGRICULTURE,	***)***	
	)	
Defendant	***)***	
	)	

MEMORANDUM DECISION AND ORDER
ON CROSS-MOTIONS TO AMEND SCHEDULING ORDER

On January 31, 2000 the court issued a proposed scheduling order assigning the instant case to the standard track and contemplating a trial date of August 2001. Scheduling Order, etc. ("Scheduling Order") (Docket No. 5). On February 12, 2001 Maine Care Services, Inc. ("MCS") objected on the basis that the case would not require a trial and that the court should establish a briefing schedule in lieu thereof. Plaintiff's Objection to the Court's Scheduling Order ("Plaintiff's Objection") (Docket No. 6). However, MCS argued that discovery nonetheless remained appropriate in view of "the hearing officer's ex-parte communications and other improprieties not on the record." *Id*. at 1. On February 16, 2001 the United States Department of Agriculture ("USDA") objected to MCS's request for discovery and proposed its own briefing schedule in lieu of trial. Defendant's Objection to Scheduling Order and Response to Plaintiff's Objection (Docket No. 7). On February 28, 2001, following a telephone conference with counsel, I granted MCS leave to supplement its objection by filing "one or more affidavits detailing communications between the administrative hearing officer and

DHS alleged to be *ex parte* as well as the basis for believing other communications occurred between the hearing officer [and others] on an *ex parte* basis." Endorsement to Plaintiff's Objection. With the benefit of MCS's supplementation and USDA's response thereto, I now amend the Scheduling Order to permit MCS limited discovery, and to establish a briefing schedule in lieu of trial, in the manner specified below.

I. Background

In its supplemental materials MCS demonstrates that:

1. Following a meeting with MCS on September 2, 1999, the USDA hearing officer, by letter dated March 16, 2000, communicated directly with the Maine Department of Human Services ("DHS") concerning the substance of the matters in issue. Complaint for Judicial Review ("Complaint") (Docket No. 1) ¶ 14; Answer (Docket No. 4) ¶ 14; Letter dated March 16, 2000 from Beverly King to Richard L. Jones, attached as Exh. H to Complaint.

2. DHS – which had directed MCS, based on the results of a federal audit, to refund $353,865 in alleged overpayments to USDA – responded with a detailed letter. Undated letter from Richard L. Jones to Beverly King, attached as Exh. I to Complaint; *see also* Complaint ¶¶ 9-11; Answer ¶¶ 9-11.

3. Subsequently (on April 17, 2000) the hearing officer ruled against MCS. Letter dated April 17, 2000 from Beverly King to Jim Bauer, attached as Exh. A to Complaint.

4. Until counsel for MCS obtained these *ex parte* letters through a Freedom of Access request in October 2000, neither he nor his client was aware of their existence. Affidavit of Stephen C. Whiting, Esq. (Docket No. 9) ¶ 3.

5. The underlying administrative record reveals a number of additional *ex parte* communications between the hearing officer and other people (in such forms as e-mails and meetings);

these communications explore, sometimes in great detail, the substantive issues in the case; it is impossible to discern from the face of the record the identity and affiliation of some of these contacts; and MCS and its counsel were unaware of these communications until receiving a copy of the administrative record on January 29, 2001. *Id*. ¶ 4 & attachments thereto.

II. Analysis

The basis for review of an administrative decision – such as that in issue here – is the administrative record. *See, e.g., Town of Norfolk v. United States Army Corps of Eng'rs*, 968 F.2d 1438, 1458 (1st Cir. 1992). Nonetheless in some circumstances discovery is appropriate; specifically, "[c]ourts require a strong showing of bad faith or improper behavior before ordering the supplementation of the administrative record." *Id*. at 1458-59. MCS makes no showing of bad faith; however, I conclude that it makes a strong showing of "improper behavior" warranting the discovery requested. *See Sokaogon Chippewa Cmty. v. Babbitt*, 929 F. Supp. 1165, 1176 (W.D. Wis. 1996), *vacated in part on other grounds on reconsid.*, 961 F. Supp. 1276 (W.D. Wis. 1997) ("When there are adequate grounds to suspect bad faith or improper behavior that are not apparent from the administrative record, depositions of the decisionmakers are appropriate.").

MCS offers two alternative theories of "improper behavior": (i) that the hearing officer contravened applicable Administrative Procedure Act ("APA") provisions, which bar *ex parte* communications and (ii) that in any event, given the substantive nature of the *ex parte* contacts in which she engaged, the conduct offended MCS's constitutional due-process rights. Plaintiff's Supplemental Objection to the Court's Scheduling Order ("Plaintiff's Supp. Objection") (Docket No. 8) at 2-3. For purposes of the instant motion, MCS makes a strong showing that each of these constraints likely was violated.

USDA points out that there are two classes of agency adjudications – so-called "formal" adjudications pursuant to 5 U.S.C. § 554, with respect to which *ex parte* communications are explicitly banned, and so-called "informal" adjudications pursuant to 5 U.S.C. § 555, with respect to which there is no such *per se* ban.[1] Defendant's Response to Plaintiff's Supplemental Objection ("Defendant's Supp. Objection") (Docket No. 10) at 3-5; *see also American Airlines, Inc. v. Department of Transp.*, 202 F.3d 788, 798 n.4 (5th Cir. 2000) (APA ban on *ex parte* communications does not cover informal adjudications); *United States v. Iron Mountain Mines, Inc.*, 987 F. Supp. 1250, 1262 (E.D. Cal. 1997) ("Where the agency is engaged in informal adjudication, as opposed to formal adjudication or rulemaking, there is no per se prohibition on ex parte contacts.").

MCS contends that the adjudication at issue here should have been formal; USDA asserts that it was legitimately informal. Plaintiff's Supp. Objection at 2; Defendant's Supp. Objection at 3; *see also* Complaint ¶¶ 19-24. The applicable USDA statute and its accompanying regulations do not expressly state whether formal proceedings are contemplated. The statute provides in relevant part for a "fair hearing" in accordance with regulations to be issued by the Secretary of USDA. 42 U.S.C. § 1766(e). The implementing regulation in turn provides *inter alia*:

> (3) . . . The appellant may retain legal counsel, or may be represented by another person. A hearing shall be held by the review official in addition to, or in lieu of, a review of written information submitted by the appellant only if the appellant so specifies in the letter of request for review. . . . A representative of the State agency shall be allowed to attend the hearing to respond to the appellant's testimony and to answer questions posed by the review official;

[1] Section 554(d)(1) provides, with certain exceptions, that hearing officers may not "consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate[.]" In addition, 5 U.S.C. § 557(d)(1)(B), which pertains to cases adjudicated pursuant to section 554, states that "no member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of the proceeding, shall make or knowingly cause to be made to any interested person outside the agency an ex parte communication relevant to the merits of the proceeding[.]"

> (4) If the appellant has requested a hearing, the appellant and the State agency shall be provided with at least 10 calendar days advance written notice, sent by certified mail, return receipt requested, of the time and place of the hearing;
>
> (5) Any information on which the State agency's action was based shall be available to the appellant for inspection from the date of receipt of the request for review;
>
> (6) The review official shall be an independent and impartial official other than, and not accountable to, any person authorized to make decisions that are subject to appeal under the provisions of this section;
>
> (7) The review official shall make a determination based on information provided by the State agency and the appellant, and on Program regulations;
>
> (8) Within 60 calendar days of the State agency's receipt of the request for review, the review official shall inform the State agency and the appellant of the determination of the review . . . .

7 C.F.R. § 226.6(k).[2] The parties do not cite, nor can I find, caselaw considering whether USDA review of an adverse decision in this particular context must be formal. Nonetheless, the First Circuit has construed 5 U.S.C. § 554 in a manner that suggests it should have been. With exceptions not here relevant, section 554 applies "in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing[.]" 5 U.S.C. § 554(a). The First Circuit has rejected the notion "that the precise words 'on the record' must be used to trigger the APA," explaining:

> Our holding does not render the opening phrases of § 554 of the APA meaningless. We are persuaded that their purpose was to exclude 'governmental functions, such as the administration of loan programs, which traditionally have never been regarded as adjudicative in nature and as a rule have never been exercised through other than business procedures.' . . . In short, we view the crucial part of the limiting language to be the requirement of a statutorily imposed hearing. We are willing to presume that, unless a statute otherwise specifies, an adjudicatory hearing subject to judicial review must be on the record.

Seacoast Anti-Pollution League v. Costle, 572 F.2d 872, 876-77 (1st Cir. 1978).[3]

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[2] These hearing procedures, which govern review by state agencies, also apply to cases (such as this one) in which USDA instead conducts review because adverse state action was taken on the basis of a federal audit determination. 7 C.F.R. § 226.8(g).

[3] The question whether the adjudication in issue should have been formal or informal, which is not thoroughly briefed at this stage of the proceedings, is not entirely free from doubt. S*ee, e.g., Sierra Club v. Peterson*, 185 F.3d 349, 367 n.26 (5th Cir. 1999), *vacated*

(*continued on next page*)

In any event, MCS makes a strong showing of likely "improper behavior" on the basis of its theory of due-process violation as well. "The ultimate question in determining if a proceeding in which *ex parte* communications occurred must be vacated [on due-process grounds] is whether the integrity of the process and the fairness of the result were irrevocably tainted by the communications." *Springfield Terminal Ry. Co. v. United Transp. Union*, 767 F. Supp. 333, 349 (D. Me. 1991); *see also Sierra Club v. Costle*, 657 F.2d 298, 400 (D.C. Cir. 1981) ("Where agency action resembles judicial action, where it involves formal rulemaking, adjudication, or quasi-adjudication among conflicting private claims to a valuable privilege, the insulation of the decisionmaker from ex parte contacts is justified by basic notions of due process to the parties involved.") (footnotes and internal quotation marks omitted).

The evidence adduced by MCS – in particular the hearing officer's *ex parte* exchange of letters with the state agency that had taken the adverse action in question – raise a serious question whether the integrity and fairness of the review process was irrevocably tainted.[4]

III. Conclusion

For the foregoing reasons, the cross-motions of MCS and USDA to amend the MCS's request are each **GRANTED** in part and **DENIED** in part, and the Scheduling Order is hereby amended as follows:

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on other grounds on reconsid., 228 F.3d 559 (5th Cir. 2000) ("While the Supreme Court expressed a preference for formal adjudication in the early years of the APA, [w]ith the passage of time, however, the notion that one should, when in doubt, invoke the APA's procedures has waned. In other words, informal adjudication is by far more prevalent today.") (citations and internal quotation marks omitted). Nonetheless, I need not definitively resolve it inasmuch as I am satisfied that a sufficiently strong showing has been made to justify the discovery requested.

[4] In response to MCS's due-process argument USDA contends that whether *ex parte* communications within the context of informal agency decisionmaking violate constitutional due process "is a more involved question," Defendant's Supp. Objection at 5; however, USDA neither elaborates upon nor cites authority for that proposition. USDA also posits that MCS did not have a protected property interest in continued participation in the program in issue, *id*. at 5-6 n.3; however, that is not the gravaman of the Complaint, which seeks judicial review of the hearing officer's decision upholding DHS's requirement, based on the results of a federal audit, that MCS (*continued on next page*)

1. The "Track Assignment" section on page 1 is deleted and the following is substituted: "Track Assignment: This case has been assigned to the Standard Track. MCS is permitted to depose hearing officer Beverly King concerning *ex parte* communications and the effect, if any, such communications had on her decision. Should either party desire followup discovery, the parties shall confer and attempt to agree regarding the same. Failing such agreement, the party desiring further discovery may petition the court to permit it."

2. The "Deadline for Filing of All Dispositive Motions" and "Expected Trial Date" sections on page 3 are deleted and the following is substituted: "Briefing Schedule: The case shall be decided on the basis of dispositive cross-motions for judgment on a stipulated record, *see Continental Grain Co. v. Puerto Rico Mar. Shipping Auth.*, 972 F.2d 426, 429 n.7 (1st Cir. 1992), or, failing agreement on a stipulated record, on the basis of cross-motions for summary judgment submitted, in either case, within sixty (60) days following the close of discovery, with opposition briefs due within thirty (30) days of the filing of those motions and reply briefs due within fifteen (15) days following the filing of the opposition briefs."

So ordered.

Dated this 15th day of March, 2001.

David M. Cohen
United States Magistrate Judge

STNDRD

U.S. District Court
District of Maine (Portland)

CIVIL DOCKET FOR CASE #: 00-CV-358

refund $353,865 in alleged overpayments to USDA, *see* Complaint at 1, ¶¶ 9-11.

MAINE CARE SERVICES v. AGRICULTURE, US DEPT Filed: 11/07/00
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Cause: 05:702 Administrative Procedure Act

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